90-1237

No. _____

FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DANA HERBERT THEIS,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTION PRESENTED

I. Does the State of North Carolina deny Petitioner due process and equal protection of the laws by arbitrarily permitting immediate appeals from interlocutory orders in some cases and denying an immediate appeal in this and other cases?

STATEMENT OF CORPORATE AFFILIATION

No corporations are involved in this matter.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
STATEMENT OF CORPORATE AFFILIATION	II
TABLE OF AUTHORITIES	VI
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
Fourteenth Amendment, Section 1, United States Constitution	2
North Carolina General Statute § 7A-27	2
North Carolina General Statute § 1-277	3
STATEMENT OF THE CASE	5
State v. *Joseph*, 92 N.C. App. 203, 374 S.E. 2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989)	5
State v. *Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986)	5
REASON FOR GRANTING THE WRIT	7
WHEN A STATE APPELLATE COURT PERMITS INTERLOCUTORY REVIEWS OF A TRIAL COURT'S DENIAL OF A DEFENDANT'S MOTION TO DISMISS BASED UPON DOUBLE JEOPARDY GROUNDS IN SOME CASES, AND REFUSES TO REVIEW MOTIONS BASED ON SIMILAR GROUNDS IN OTHER CASES, THERE IS A DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS OF	

Page

THOSE DEFENDANTS WHO DO NOT HAVE THEIR CASES REVIEWED 7

McKane v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894) 7

Evitts v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985) 7

United Gas Public Service Co. v. *Texas*, 303 U.S. 123, 58 S.Ct. 483 (1938) 7

Ake v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985) . 7

Ross v. *Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974) ... 7

McCoy v. *Court of Appeals of Wisconsin*, 486 U.S. 429, 108 S.Ct. 1895 (1988) 8, 9

Reynolds v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964) . 8

Ross v. *Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974) ... 8

Griffin v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956) ... 8

State v. *Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1975), *appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975) 8

State v. *Montalbano*, 73 N.C. App. 421, 326 S.E.2d 634 (1985), *appeal dismissed and disc. rev. denied*, 313 N.C. 608, 332 S.E.2d 182 (1985) 8

State v. *Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987) 8

State v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 241 (1988), *disc. rev. denied*, 324 N.C. 115, 377 S.E. 2d 241 (1989) 9

State v. *Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989) 10

State v. *Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986) .9, 10

Page

State v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *disc. rev. denied*, 324 N.C. 115, 377 S.E. 2d 241 (1989) 9, 10

Dowd v. *United States, ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262 (1951) 10

Huffman v. *Beto*, 382 F.2d 777 (5th Cir. 1967), *cert. denied*, 401 U.S. 946, 91 S.Ct. 946 (1971) 10

Riner v. *Raines*, 274 Ind. 113, 409 N.E.2d 575 (1980) 10

United States v. *Smith*, 464 F.2d 194 (10th Cir. 1972), *cert. denied*, 409 U.S. 1066, 93 S.Ct. 566 (1972) 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	Page
Ake v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985)	7
Dowd v. *United States, ex. rel. Cook*, 340 U.S. 206, 71 S.Ct. 262 (1951)	10
Evitts v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985)	7
Griffin v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956)	8
Huffman v. *Beto*, 382 F.2d 777 (5th Cir. 1967), *cert. denied*, 401 U.S. 946, 91 S.Ct. 946 (1971)	10
McCoy v. *Court of Appeals of Wisconsin*, 486 U.S. 429, 108 S.Ct. 1895 (1988)	8, 9
McKane v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894)	7
Reynolds v. *Sims*, 377 U.S. 533, 84 S.Ct. 1361 (1964)	8
Riner v. *Raines*, 274 Ind. 113, 409 N.E.2d 575 (1980)	10
Ross v. *Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974)	7, 8
State v. *Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1975), *appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975)	8
State v. *Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986)	5, 9, 10
State v. *Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989)	10
State v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 241 (1988), *disc. rev. denied*, 324 N.C. 115, 377 S.E. 2d 241 (1989)	5, 8, 9, 10
State v. *Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987)	8
State v. *Montalbano*, 73 N.C. App. 421, 326 S.E.2d 634 (1985), *appeal dismissed and disc. rev. denied*, 313 N.C. 608, 332 S.E.2d 182 (1985)	8

Page

United Gas Public Service Co. v. *Texas*, 303 U.S. 123, 58 S.Ct. 483 (1938) 7

United States v. *Smith*, 464 F.2d 194 (10th Cir. 1972), *cert. denied*, 409 U.S. 1066, 93 S.Ct. 566 (1972) 10

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PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT IN A CRIMINAL CASE

OPINIONS BELOW

The decision of the North Carolina Court of Appeals dismissing Petitioner's appeal was entered on June 5, 1990. The dismissal is reported without opinion as *State* v. *Theis*, 98 N.C. App. 700, 392 S.E.2d 780 (1990), and a copy of the unpublished opinion is attached. (Copy attached; appendix p. 2a.) A notice of appeal or, in the alternative, a petition for discretionary review to the Supreme Court of North Carolina was filed on July 10, 1990. A motion to dismiss the appeal was granted and the petition for discretionary review was denied in an order entered November 8, 1990. (Copy at-

tached; appendix p. 7a.) The trial court denied Petitioner's motion to dismiss the indictment from which the appeal was taken on April 24, 1989. (Copy attached; appendix p. 9a.)

JURISDICTIONAL STATEMENT

The judgment of the North Carolina Court of Appeals dismissing Petitioner's appeal was entered June 5, 1990. The Supreme Court of North Carolina refused to review that decision by order dated November 8, 1990. The writ of certiorari is requested pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment, Section 1, United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. North Carolina General Statute § 7A-27, which provides:

> (a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death or imprisonment for life.
>
> (b) From any final judgment of a superior court, other than one described in subsection (a) of this

section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

(c) From any final judgment of a district court in a civil action appeal lies or right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which:

(1) affects a substantial right, or

(2) in effect determines the action and prevents a judgment from which appeal might be taken, or

(3) discontinues the action, or

(4) grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals.

3. North Carolina General Statute § 1-277, which provides:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or a legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceedings; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

STATEMENT OF THE CASE

Petitioner Dana Herbert Theis was indicted in January and February, 1987 on six (6) counts each of dissemination of obscenity and possession with intent to disseminate obscenity. A week-long trial was held in November of 1987, and it resulted in a transcript in excess of eleven hundred (1100) pages. At the end of the State's evidence, and again at the close of all the evidence, Petitioner moved to dismiss the indictment on the ground that the evidence adduced at trial was insufficient as a matter of law to sustain a verdict. The trial court denied these motions, and the case was submitted to the jury on November 9, 1987. The jury became hopelessly deadlocked, and the trial court declared a mistrial on November 10, 1987. Subsequently, when the State of North Carolina again attempted to try Petitioner on these charges, he moved to dismiss the charges on the basis that he was being placed twice in jeopardy for the same offense under the North Carolina Constitution. The trial court overruled this motion, and Petitioner took an appeal to the North Carolina Court of Appeals. The sole contention presented in that appeal was that the trial court erred in not dismissing the charges prior to the second trial because the evidence was insufficient to permit the case to go to the jury in the first trial, and, therefore, jeopardy had attached barring Petitioner's retrial.

The Court of Appeals dismissed Petitioner's appeal *sua sponte* after briefing and oral argument without addressing the merits of Petitioner's double jeopardy claim. The Court of Appeals, relying on *State* v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989), and *State* v. *Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986), held that:

> Although NC Gen Stat § 7A-27(3) may permit an appeal under a "substantial right" analysis and NC Gen Stat § 1-277(a) in many cases, *we are bound by the holding in Joseph and the unqualified holding in*

Henry that "[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case". State v. *Theis*, Case No. 8918SC739, unreported (June 5, 1990), p.3 (citations omitted; emphasis added).

REASON FOR GRANTING THE WRIT

WHEN A STATE APPELLATE COURT PERMITS INTERLOCUTORY REVIEWS OF A TRIAL COURT'S DENIAL OF A DEFENDANT'S MOTION TO DISMISS BASED UPON DOUBLE JEOPARDY GROUNDS IN SOME CASES, AND REFUSES TO REVIEW MOTIONS BASED ON SIMILAR GROUNDS IN OTHER CASES, THERE IS A DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS OF THOSE DEFENDANTS WHO DO NOT HAVE THEIR CASES REVIEWED.

It is well-established that the individual states are not required to grant any convicted defendant an appeal by the United States Constitution. *McKane* v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1894). However, it is equally well-established that if a state has created a system of appellate courts, the procedure used in determining criminal appeals must comport with the demands of both the due process and the equal protection clauses of the United States Constitution. *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). When the North Carolina appellate court permits an appeal of a particular order based upon a particular claim in certain cases, and denies other defendants the right to appeal similar orders based upon the identical claim, there is a deprivation of the latter defendants' constitutionally guaranteed rights to due process and equal protection of the laws. While a state is "entitled to determine the procedure of its courts . . ." it still must provide "the requisite due process" mandated by the federal constitution. *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 140, 58 S.Ct. 483, 492 (1938).

Due process of law mandates that criminal defendants be provided with "an adequate opportunity to present their claims fairly with the adversary system." *Ake* v. *Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094 (1985), *(citing Ross* v. *Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444 (1974)). A state's enforcement of its criminal laws "must comply with

the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment." *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429, 435, 108 S.Ct. 1895, 1900 (1988).

The concept of equal protection of the laws contained in the Fourteenth Amendment to the United States Constitution "has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the government action questioned or challenged." *Reynolds* v. *Sims*, 377 U.S. 533, 565, 84 S.Ct. 1362, 1383 (1964). As then-Justice Rehnquist stated in *Ross* v. *Moffitt*, 417 U.S. at 612, 94 S.Ct. at 2444, the equal protection clause "require[s] that the State appellate system be 'free of unreasoned distinctions' . . . ." The Fourteenth Amendment applies to any appellate system that a state may choose to put in place. *Griffin* v. *Illinois*, 351 U.S. 13, 38, 76 S.Ct. 585, 599 (1956) (Harlan, J., dissenting) ("the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed"); *see also id.* at 17, 76 S.Ct. at 590 (plurality opinion) ("[b]oth equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice *in every American court*") (citations omitted; emphasis added).

The North Carolina Court of Appeals has in the recent past inconsistently granted (or withheld) appeals from interlocutory orders in the trials of criminal defendants. These inconsistent decisions inherently result in a denial of equal protection of the laws. For example, in *State* v. *Alderman*, 25 N.C. App. 14, 212 S.E.2d 205 (1975), *appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975), an appeal from an interlocutory order, a motion for a continuance, was permitted. *See also State* v. *Montalbano*, 73 N.C. App. 421, 326 S.E.2d 634 (1985), *appeal dismissed and disc. rev. denied*, 313 N.C. 608, 332 S.E.2d 182 (1985) (permitting interlocutory appeal). In *State* v. *Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987),

the Court of Appeals permitted an immediate appeal of an order denying a motion to dismiss which was based on double jeopardy grounds. However, in *State* v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 241 (1988), *disc. rev. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989), the court denied an immediate appeal of an interlocutory order which denied a motion to dismiss on double jeopardy grounds. Most recently, the Court of Appeals permitted an immediate appeal from an interlocutory order implicating double jeopardy principles in *State* v. *Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989).

Any cursory review of these cases demonstrates that the North Carolina Court of Appeals has granted and denied appeals from interlocutory orders in criminal cases without any consistent rationale. Therefore, the State's enforcement of its criminal laws has failed to comply "with the principles of substantial equality and fair procedures that are embodied in the Fourteenth Amendment." *See McCoy*, 486 U.S. at 435, 108 S.Ct. at 1900.

It is clear that decisions of the North Carolina Court of Appeals regarding interlocutory appeals in criminal cases are in conflict. The panel of the Court of Appeals which decided the case *sub judice* concluded from its review of the caselaw that the Supreme Court of North Carolina had conclusively determined that under no circumstances may there be an "appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." *State* v. *Theis*, unreported at 3. The Court of Appeals based this finding on "the unqualified holding" of the North Carolina Supreme Court in *State* v. *Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986). *Id.* The Court of Appeals also referred to its own decision in *State* v. *Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *disc. rev. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989). *Id.*

Therefore, both *this case*, and *State* v. *Joseph*, can be read as authority for the proposition that an interlocutory appeal is never permitted in a criminal case in the State of North

Carolina. Such a proposition stands in direct contradiction to the express language of N.C. Gen. Stat. § 1-277, which provides that an appeal "may be taken from *every judicial order or determination* of a judge of a superior or district court . . . which affects a substantial right. . . ." (Emphasis added.)

Also in direct contradiction to this case and the *Joseph* and *Henry* decisions is a Court of Appeals decision in *State* v. *Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989). In *Johnson*, a criminal defendant appealed from a trial judge's order setting aside a judgment of conviction and returning the case to the trial calendar. The State moved to dismiss the appeal on the grounds that it was premature and that the order was interlocutory. The Court of Appeals held that:

> This judgment affects the substantial due process right of the defendant not to have the state withdraw a plea bargain that has been accepted by the trial court. This is a substantial right. *The defendant's constitutional right against double jeopardy is also at issue where the defendant would be subjected to a second trial on the same charges. The effect of the trial judge's order vacating the judgment would be to grant the state a new trial on the same charges. Id.* at 758, 383 S.E.2d at 693 (citations omitted; emphasis added).

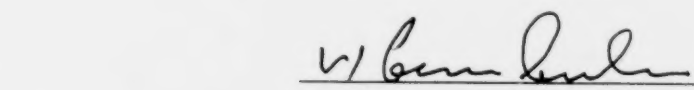
This situation, where a state prevents appellate review of a defendant's claims, has been held to violate the equal protection clause of the Fourteenth Amendment. *See Dowd* v. *United States, ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262 (1951). A state cannot arbitrarily deny the right of appeal once it has made it available in the general run of cases. *Huffman* v. *Beto*, 382 F.2d 777 (5th Cir. 1967), *cert. denied*, 401 U.S. 946, 91 S.Ct. 946 (1971). Therefore, to the extent that a state provides the right of appeal in criminal cases, the equal protection clause of the Fourteenth Amendment requires that all affected defendants be treated alike. *Riner* v. *Raines*, 274 Ind. 113, 409 N.E.2d 575 (1980). Petitioner has been arbitrarily singled out by the State of North Carolina and

denied the right to an appeal where the State has permitted others to appeal. North Carolina has arbitrarily and invidiously discriminated against Petitioner in direct violation of the guarantees of the equal protection clause of the Fourteenth Amendment. *See United States* v. *Smith*, 464 F.2d 194 (10th Cir. 1972), *cert. denied*, 409 U.S. 1066, 93 S.Ct. 566 (1972).

CONCLUSION

For all the foregoing reasons, and to insure that the guarantee of equal protection contained in the Fourteenth Amendment to the United States Constitution will apply to appellants equally when a state grants a right to appellate review, Petitioner Dana Herbert Theis requests that this Court issue a Writ of Certiorari to the North Carolina Court of Appeals.

Respectfully submitted,



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APPENDIX

OFFICE OF THE CLERK
COURT OF APPEALS OF NORTH CAROLINA

NOTICE OF FILING OF OPINION AND ISSUANCE OF MANDATE
(Received June 6, 1990)

Beginning with the opinion filing date of January 17, 1989, the Court has directed the Clerk to provide, without cost, a copy of the opinion to each attorney of record in the case. However, the Court has further directed that only one (1) copy per law firm will be provided. Accordingly, a copy of the attached opinion for the filing date indicated below is enclosed.

FILING DATE OF OPINION:	June 5, 1990
DATE MANDATE WILL BE ISSUED TO THE TRIAL TRIBUNAL PURSUANT TO RULE 32(b):	June 25, 1990

NO. 8918SC739

NORTH CAROLINA COURT OF APPEALS

Guilford County No. 86-CRS-85834, 87-CRS-20210,
87-CRS-20324-20333

STATE OF NORTH CAROLINA
v.
DANA HERBERT THEIS

(Filed June 5, 1990)

Appeal by defendant from order entered 24 April 1989 by Judge W. Steve Allen in Guilford County Superior Court. Heard in the Court of Appeals 7 February 1990.

Defendant was indicted in January and February 1987 on six counts each of dissemination of obscenity and possession with intent to disseminate obscenity. On 2 November 1987, the case came to trial on all counts. Defendant moved to dismiss the indictments at the close of the State's evidence and again at the close of all evidence based upon insufficiency of the evidence, and the trial court denied defendant's motions. Defendant did not appeal denial of these motions.

The case was sent to the jury on 9 November 1987. On 10 November 1987, the trial court declared a mistrial after concluding that the jury was "hopelessly deadlocked."

Superseding indictments in each of the above 12 cases were returned by the Guilford County Grand Jury on 21 March 1988. The only difference between the indictments of 1987 and the superseding indictments is that the superseding indictments contained the names of the undercover policy officers involved in the purchase of the allegedly obscene materials. The cases were consolidated and set for retrial on 24 April 1989.

At the call of the cases for retrial, defendant moved to

dismiss all counts on double jeopardy grounds. The trial court denied defendant's motion.

From denial of this motion, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Lawrence Reeves, Jr., for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant-appellant.

ORR, Judge.

The dispositive issue on appeal is whether defendant's appeal should be dismissed as an interlocutory appeal. For the reasons set forth below, we hold that defendant's appeal is interlocutory and therefore dismiss the appeal.

On 16 August 1989, the State filed a motion to dismiss defendant's appeal alleging that the appeal is interlocutory. The State withdrew this motion in its brief. However, under the N.C. Rules of Appellate Procedure, this Court may dismiss an appeal upon its own motion in applying the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984). The State originally maintained that State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989) and State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986), require this Court to dismiss defendant's appeal.

In *Joseph*, this Court reviewed the conflicting opinions in this state on the issue of whether an appeal on double jeopardy grounds before a second trial is interlocutory. The *Joseph* court concluded that the right to appeal in a criminal case is not a federal constitutional right but is a statutory right. The statutory right to appeal is found in N.C. Gen. Stat. § 15A-1444(d), which limits criminal appeals to those found in § 15A-1441 *et seq.*, Chapter 7A and the Rules of Appellate Procedure. 92 N.C. App. at 206, 374 S.E.2d at 134.

Although N.C. Gen. Stat. § 7A-27(3) may permit an appeal under a "substantial right" analysis and N.C. Gen. Stat. § 1-277(a) in many cases, we are bound by the holding in *Joseph* and the unqualified holding in *Henry* that "[t]here is

no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." 318 N.C. at 409, 348 S.E.2d at 593 (citations omitted).

Moreover, we are not convinced in the case *sub judice* that defendant's motion to dismiss upon insufficient evidence in the first trial may be reviewed by this Court. Defendant concedes that he does not have the right to appeal from a mistrial granted because of a hung jury. Double jeopardy does not attach under these circumstances. State v. Simpson, 303 N.C. 439, 447, 279 S.E.2d 542, 547 (1981).

Defendant's argument on appeal, however, (although couched in terms of an appeal from denial of a motion to dismiss the charges on double jeopardy grounds), is premised exclusively on the sufficiency of the State's evidence at the first trial. It appears to this Court that defendant is labeling his appeal one thing and arguing that which he is not permitted to appeal under *Simpson* and the cases cited therein. Further, N.C. Gen. Stat. § 15A-1441, *et. seq.* does not allow a defendant to "bootstrap" an appeal based upon insufficiency of the evidence or to an appeal on double jeopardy grounds.

We are not persuaded by defendant's argument that defendant has a common law right to protection against double jeopardy. *Berry* v. *Commonwealth*, 393 Mass. 793, 473 N.E.2d 1115 (1985). We have reviewed the statutory and case law in this state and find no authority for the above argument.

Moreover, defendant's reliance on Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), is misplaced. In *Abney*, the Supreme Court addressed the issue of whether denial of a motion to dismiss an indictment on double jeopardy grounds is interlocutory. In holding that such an appeal in *Abney* was not interlocutory, the Supreme Court stated that it was not addressing any claim that the defendant may have had to the merits of the charge against him or any evidence at the first trial that was used against him. *Id.* at 659, 97 S.Ct. at 2040, 52 L.Ed.2d at 660.

Abney was also factually different from the case before us. The defendant in *Abney* was convicted by a jury of the offense charged, and the conviction was later overturned by an appellate court on the grounds that evidence was admitted improperly at trial. *Id.* at 655, 97 S.Ct. at 2038, 52 L.Ed.2d at 657. In our case, defendant was not convicted of the crimes charged because of the mistrial.

For the reasons set forth above, we dismiss the defendant's appeal as interlocutory.

Dismissed.

Judges ARNOLD and JOHNSON concur.

Report per Rule 30(e).

NO. 8918SC739

NORTH CAROLINA COURT OF APPEALS

Guilford County No. 86CRS85834, 87CRS20210, 20324-33

STATE OF NORTH CAROLINA
v.
DANA HERBERT THEIS

(Filed November 27, 1990)

Appeal to review the decision of the Court of Appeals filed on June 5, 1990 was dismissed and Petition for Discriminatory Review was denied by order of the Supreme Court of North Carolina in Conference on the 8th day of November, 1990 and same has been certified to the North Carolina Court of Appeals.

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Guilford County North Carolina that the Supreme Court has dismissed the Appeal and denied the Petition for Discretionary Review in this cause.

Witness my hand and official seal this the 27 day of November, 1990.

/s/ Francis E. Dail
Clerk of the Court of Appeals

/s/ Joanne Slakeman
Deputy Clerk

XC: Loflin & Loflin
Sirkin, Pinales & Schwartz
G. Lawrence Reeves, Jr., Assistant Attorney General

No. 294P90

SUPREME COURT OF NORTH CAROLINA

From Guilford (8918SC739)

STATE OF NORTH CAROLINA
v.
DANA HERBERT THEIS

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Attorney General; and upon consideration of the petition for discretionary review of the decision of the North Carolina Court of Appeals, filed by Defendant pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 8th day of November 1990.

/s/ Whichard, J.
For the Court"

The Petition for Discretionary Review is:

"Denied by order of the Court in conference, this the 8th day of November 1990.

/s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of November 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

/s/ Peggy M. Byrd
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Thomas F. Loflin, III, Attorney at Law, For the Defendant
Messra H. Louis Sirkin and Edmund J. McKenna, Attorneys at Law, For the For the [sic] Defendant
Mr. G. Lawrence Reeves, Jr., Assistant Attorney General, For the State
Ms. Barbara G. Washington, Clerk of Superior Court
Mr. Horace Kimel, District Attorney
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
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NO. 8918SC739

NORTH CAROLINA COURT OF APPEALS
EIGHTEENTH DISTRICT

From Guilford County No. 86-CRS-85834, 87-CRS-20210, 87-CRS-20324-20333

STATE OF NORTH CAROLINA
v.
DANA HERBERT THEIS

BEFORE ALLEN, J., at the April 24, 1989, criminal session of Guilford Superior Court sitting in Greensboro. Defendant orally moved in open court to dismiss all of the indictments and superseding indictments involved in this appeal on grounds that he had already been subjected to jeopardy on these charges at a jury trial at the November 2, 1987, session of Guilford Superior Court and that to re-try him on same would subject him to double jeopardy in violation of rights secured to him by the Constitutions of the United States and of North Carolina. The trial court denied the motion, and DEFENDANT APPEALED, giving Notice of Appeal in open Court on April 24, 1989. (Record filed and docketed C.A. July 14, 1989).